Ch'ng Ping Teong v M & A Securities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–723 OF 2003
MOKHTAR SIDIN, HASHIM YUSOFF AND AUGUSTINE PAUL JJCA
20 AUGUST 2007

Evidence — Hearsay — Statement made by person not called — Witness not available — Whether diligent and exertive attempts made to procure witness — Evidence Act 1950 s 32

The plaintiff was the managing director and substantial shareholder of Timbermaster Industries Bhd ('TIB'). The defendant was a stockbroking company. The plaintiff applied for a margin trading facility of RM25m to finance his purchase of securities in TIB. The application was approved by the defendant. The plaintiff deposited into his account with the defendant 4,027,521 TIB moratorium shares as security for the margin facility. On 25 May 1999 the plaintiff instructed the defendant to close his account and to return the shares deposited. The defendant refused. The plaintiff filed this action seeking inter alia a declaration that the defendant wrongfully withheld the shares deposited, the return of the shares to the plaintiff forthwith and for damages to be assessed. The defendant contended that the plaintiff had verbally instructed the defendant's servant Mr Steven Wong to transfer the shares to the account of a third party. The defendant furnished further and better particulars to the effect that the plaintiff gave instructions to transfer the shares to Steven Wong via a telephone conversation on 10 January 1997. The shares were subsequently sold and the proceeds were used to settle the outstanding sum in the third party's account. The defendant admitted that when the plaintiff closed his account, there was no outstanding amount due from the plaintiff to them. After trial, the High Court found in favour of the defendant and dismissed the plaintiff's claim. The plaintiff appealed to the Court of Appeal.

Held, allowing the appellant's appeal with costs:

(1) During the trial the defendant did not call Mr Steven Wong as its witness. Instead, to prove such an instruction was given, the defendant called Mr Neoh Wee Hong (SD1), the defendant's assistant manager, to give evidence pursuant to s 32 of the Evidence Act 1950 on the ground that Steven Wong was not available. The defendant admitted that it did not apply for subpoena to call the said Steven Wong to appear in court to give evidence. The only thing that the defendant did was to inquire from the wife of Steven Wong who stated that Steven Wong was overseas (see para 7).

(2) Looking at the evidence of SD1, nowhere was it mentioned about the telephone instruction between the plaintiff and Steven Wong. The only thing that was stated was that SD1 received a letter from the plaintiff dated

10 January 1997 depositing 4,027,521 shares with the defendant and on 14 January 1997 he was informed by Steven Wong to transfer the said shares to a third party account in another company. Nowhere was it mentioned of the telephone instruction by the plaintiff to Steven Wong to transfer the said shares to the third party account (see para 9).

(3) There was nothing in that evidence to suggest that SD1 was present when Steven Wong spoke to the plaintiff. SD1 only stated that he was informed by Steven Wong of the instruction, not of the telephone conversation. In my view, there was no evidence of the telephone conversation between Steven Wong and the plaintiff. Even if there was mention of the telephone conversation between Steven Wong and the plaintiff whereby the instruction was given it would only be hearsay which should not be admitted as evidence. Nowhere was it stated in the evidence of SD1 to say that the purpose of depositing the said shares into Ch'ng Hong's account was to enable the plaintiff to trade as submitted by the defendant. Looking at the evidence as a whole, the defendant failed to establish that there was a telephone conversation between Steven Wong and the plaintiff that took place on 10 January 1997 whereby the instruction was given. Even if there was a telephone conversation it would not be admitted because it would be hearsay, unless Steven Wong himself gave evidence whereby SD1's evidence would be the corroborating evidence (see para 11).

(4) Other than two letters and the inquiry from the wife, the defendant did nothing else to trace the said Steven Wong. The defendant did not apply for a subpoena to compel the said Steven Wong to give evidence. The letter did not indicate what sort of evidence was required from Steven Wong. It might well be in respect of the opening of the account of the plaintiff with the respondent. For that reason these letters would not help the defendant in its case. Section 32 of the Evidence Act would not apply because there was no sufficient evidence to prove that Steven Wong who was alive then could not be found (see para 24).

(5) The defendant failed to establish that the shares were transferred on the instruction of the plaintiff. For that reason, the plaintiff had proved its case that the defendant had transferred the said shares wrongly and without authority. Therefore, the plaintiff is entitled to the prayers he sought (see para 28).

[Bahasa Malaysia summary

Plaintif merupakan pengarah urusan dan pemegang saham yang besar dalam Timbermaster Industries Bhd ('TIB'). Defendan adalah sebuah syarikat broker saham. Plaintif telah memohon satu kemudahan margin dagangan sebanyak RM25 juta bagi menampung kewangannya untuk pembelian jaminan-jaminan dalam TIB. Permohonan tersebut telah diluluskan oleh defendan. Plaintif telah memasukkan ke dalam akaunnya dengan defendan 4,027,521 saham-saham moratorium TIB sebagai jaminan untuk kemudahan margin. Pada 25 Mei 1999 plaintif mengarahkan defendan untuk menutup akaunnya dan mengembalikan saham-saham yang telah dimasukkan. Defendan enggan. Plaintif memfailkan tindakan ini memohon antara lain perisytiharan bahawa defendan secara salah enggan memulangkan saham-saham yang telah dimasukkan. Pengembalian saham-saham kepada plaintif dengan

serta-merta dan ganti rugi untuk ditaksirkan. Defendan menegaskan bahawa plaintif telah secara lisan mengarahkan pekerja defendan En Steven Wong untuk memindahkan saham-sahamnya ke akaun pihak ketiga. Defendan telah membekalkan butiran-butiran lanjut dan jelas yang menunjukkan bahawa plaintif telah memberikan arahan untuk memindahkan saham-sahamnya kepada Steven Wong melalui percakapan telefon pada 10 Januari 1997. Saham-saham tersebut kemudiannya dijual dan hasilnya telah digunakan untuk menyelesaikan jumlah tertunggak dalam akaun pihak ketiga. Defendan mengakui bahawa semasa plaintif menutup akaunnya, tidak ada jumlah tertunggak terhutang daripada plaintif kepada mereka. Selepas perbicaraan, Mahkamah Tinggi telah memihak kepada defendan dan menolak tuntutan plaintif. Plaintif merayu kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Semasa perbicaraan, defendan tidak memanggil En Steven Wong sebagai saksi. Sebaliknya, bagi membuktikan terdapat arahan diberikan, defendan telah memanggil En Neoh Wee Hong (SD1), naib pengurus defendan, bagi memberikan keterangan menurut s 32 Akta Keterangan 1950 dengan alasan bahawa Steven Wong tidak ada. Defendan mengakui bahawa ia tidak memohon untuk sepina bagi memanggil Steven Wong untuk hadir di mahkamah dan memberikan keterangan. Hanya yang dibuat oleh defendan adalah menanyakan daripada isteri Steven Wong yang menyatakan bahawa Steven Wong berada di luar negara (lihat perenggan 7).

(2) Melihat kepada keterangan SD1, tiada dinyatakan berkenaan dengan arahan melalui telefon antara plaintif dan Steven Wong. Perkara yang hanya dinyatakan adalah SD1 menerima sepucuk surat daripada plaintif bertarikh 10 Januari 1997 memasukkan saham-saham sebanyak 4,027,521 dengan defendan dan pada 14 Januari 1997, beliau telah dimaklumkan oleh Steven Wong untuk memindahkan saham-saham tersebut kepada akaun pihak ketiga dalam syarikat lain. Tiada dinyatakan berkenaan arahan melalui telefon oleh plaintif kepada Steven Wong untuk memindahkan saham-saham tadi kepada akaun pihak ketiga (lihat perenggan 9).

(3) Tiada apa-apa dalam keterangan mencadangkan bahawa SD1 hadir semasa Steven Wong bercakap dengan plaintif. SD1 hanya menyatakan bahawa beliau telah dimaklumkan oleh Steven Wong berkenaan arahan tersebut, dan bukannya melalui percakapan telefon. Pada pandangan saya, tiada keterangan mengenai percakapan telefon antara Steven Wong dan plaintif. Walaupun jika ada dinyatakan berkenaan percakapan telefon atara Steven Wong dan plaintif yang mana arahan telah diberikan ia hanyalah dengar cakap yang tidak harus diterima sebagai keterangan. Tiada apa-apa dinyatakan dalam keterangan SD1 untuk mengatakan tujuan memasukkan saham-saham tersebut ke dalam akaun Ch'ng Hong adalah untuk membolehkan plaintif berniaga sebagaimana dihujahkan oleh defendan. Melihat keseluruhan keterangan, defendan telah gagal untuk mewujudkan bahawa terdapat percakapan telefon antara Steven Wong dan Plaintif berlaku pada 10 Januari 1997 yang dengannya arahan telah diberikan. Jika adapun perbualan telefon ia tidak akan diterima kerana ia

adalah dengar cakap, melainkan Steven Wong sendiri memberikan keterangan yang dengannya keterangan SD1 boleh menjadi keterangan sokongan (lihat perenggan 11).

(4) Selain daripada dua pucuk surat dan bertanya kepada isteri, defendan tidak membuat apa-apa untuk menjejaki Steven Wong. Defendan tidak memohon sepina bagi memaksa Steven Wong untuk memberikan keterangan. Surat tersebut tidak menyatakan jenis keterangan apakah yang diperlukan daripada Steven Wong. Ia mungkin berkenaan pembukaan akaun plaintif dengan responden. Berdasarkan alasan bahawa surat-surat ini tidak akan membantu defendan dalam kesnya. Seksyen 32 Akta Keterangan tidak akan terpakai kerana tiada cukup bukti bagi membuktikan bahawa Steven Wong masih lagi hidup tetapi tidak sukar dikesan (lihat perenggan 24).

(5) Defendan telah gagal membuktikan bahawa saham-saham telah dipindahkan atas arahan daripada plaintif. Untuk sebab itu, plaintif telah membuktikan kesnya bahawa defendan telah memindahkan saham-saham tersebut secara salah dan tanpa kuasa. Oleh itu, plaintif berhak kepada permohonan yang dipohon (lihat perenggan 28).]

Notes

For cases on statement made by person not called, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1660–1662.

Legislation referred to

Evidence Act 1950 ss 32, 101

Appeal from: Suit No 22–299 of 1999 (High Court, Ipoh)

Vijay Kumar (HM Ong with him) (Kumar Jaspal Quah & Aishah) for the appellant. Dhinesh Bhaskaran (Shearn Delamore & Co) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] We have allowed this appeal earlier and now we give our reasons for doing so. We will refer to the parties as they were in the High Court.

[2] In this case the plaintiff, a businessman, was the Managing Director and substantial shareholder of Timbermaster Industries Berhad ('TIB'), a company listed on the Kuala Lumpur Stock Exchange ('KLSE'). He was also a director and shareholder of a number of other companies. The defendant is a stockbroking company. This company and Insas Credit and Leasing Sdn Bhd ('ICL') were wholly owned by Insas Bhd. Sometime in April 1996, the plaintiff applied for a margin trading facility of RM25m to finance his purchase of securities in TIB. The application was approved by the defendant through its letter dated 12 April 1996. The terms stated in that letter were accepted by the plaintiff. This acceptance was through a letter dated 19 April 1996. As a result of that both parties entered into a margin agreement ('the agreement'). Clause 2(c) of the letter of offer stated that the

A sole purpose for the opening of that facility was 'to finance the rights and warrants entitlement of TIB'. It was contended by the plaintiff that the facility was also granted for the purpose of buying and selling shares listed in the KLSE. The facility was utilised on 22 April 1996 and monthly statements of the account were posted to the plaintiff to his business address.

B

[3] Pursuant to the grant of the facility the plaintiff vide a letter dated 10 January 1997 deposited into his account with the defendant, No C06971, some 4,027,521 TIB moratorium shares ('the said shares') as security for the facility given to him. On 25 May 1999, the plaintiff instructed the defendant to close his account and to C return the said shares deposited with the defendant. The defendant refused. The plaintiff then filed the present action seeking the following reliefs:

(1) a declaration that the defendant is wrongfully withholding the 4,027,521 shares of Timbermaster pledged by the plaintiff for his account No C06971;

(2) consequential orders as follows:

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(i) the defendant returns/transfers the 4,027,521 shares of Timbermaster to the plaintiff forthwith;

(ii) the Senior Assistant Registrar to assess the damages suffered by the plaintiff;

E (3) costs; and

(4) any other relief that this honourable court deems fit.

[4] The defendant in their statement of defence admitted that the plaintiff had deposited the said shares with them. The defendant claimed that the plaintiff had F verbally instructed the defendant's agent/servant, one Mr Steven Wong to transfer the said shares to one Ch'ng Hong's account No C06996 with ICL ('the third party'). The defendant claimed that the plaintiff was informed and was aware of the transfer. The defendant admitted that when the plaintiff closed his account with the defendant, there was no outstanding amount due from the plaintiff to them. The defendant also admitted that the said shares were subsequently sold and that the G proceeds were used to settle the outstanding sum in the said third party's account.

[5] The issue to be tried is that 'was there instruction from the plaintiff to the defendant to transfer the said shares to the third party's account?' The learned judge found in favour of the defendant and held that there was an instruction from the H plaintiff. The learned trial judge then dismissed the plaintiff's claim.

[6] Before us, learned counsel for the plaintiff submitted that there is only one issue to be determined, i.e. did the plaintiff give instruction to transfer the said shares to Ch'ng Hong's account. The plaintiff also submitted that the onus of proving that the I plaintiff had instructed the defendant to transfer the said shares into Ch'ng Hong's account with ICL is on the defendant, because it was the defendant who alleged that it was so. From the record, there was evidence to show that the plaintiff requested for further and better particulars in respect of the instruction which was pleaded by the defendant in its defence and worded as follows:

The plaintiff gave the instructions to the respondent's executive director Mr Steven Wong via a telephone conversation on 10 January 1997.

[7] During the trial the defendant did not call Mr Steven Wong as its witness. Instead, to prove such an instruction was given, the defendant called Mr Neoh Wee Hong (SD1), the defendant's assistant manager, to give evidence pursuant to s 32 of the Evidence Act 1950 on the ground that Steven Wong was not available. The defendant admitted that it did not apply for subpeona to call the said Steven Wong to appear in court to give evidence. The only thing that the defendant did was to inquire from the wife of Steven Wong who stated that Steven Wong was overseas. The plaintiff objected to the evidence of SD1 on the ground that it was hearsay and did not meet the requirement of s 32 of the Evidence Act. SD1, in his testimony, stated as follows:

Melalui surat bertarikh 10 Januari 1997, yang diterima oleh M & A (M & A Securities Sdn Bhd) pada 13 Januari 1997, Norman Ch'ng telah mendeposit 4,027,521 saham-saham ('Saham tersebut') dengan M & A (M & A Securities Sdn Bhd) (lihat IDP 15). Pada 14 Januari 1997, saya telah dimaklumkan oleh Steven Wong, yang merupakan Pengurus Kewangan M & A, bahawa Norman Ch'ng ingin mendepositkan Saham tersebut dalam akaun ICL (Insas Credit & Leasing Sdn Bhd) Ch'ng Hong sebagai cagaran. Oleh yang demikian saya telah mendeposit Saham tersebut ke dalam akaun ICL (Insas Credit & Leasing Sdn Bhd) Ch'ng Hong pada hari yang sama.

[8] The plaintiff submitted that the above evidence of SD1 never alluded to any purported teleconversation between the plaintiff and Steven Wong which was alleged to have taken place on 10 January 1997 and was specifically pleaded in the defence. It is the cardinal principle of pleading that a party is bound by its own pleadings. It was the defendant who made the specific averment of the purported telephone call made by the plaintiff on 10 January 1997 to justify the transfer of the said shares from the plaintiff's account to Ch'ng Hong's account with ICL. The plaintiff then cited s 101 of the Evidence Act 1950 which provides:

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[9] The plaintiff submitted further that in the present appeal, it was the defendant's case that it had transferred the said shares in the plaintiff's account with the defendant to a third party account in another company on the authority of the plaintiff's telephone instruction to Steven Wong. Looking at the evidence of SD1, nowhere was it mentioned about the telephone instruction between the plaintiff and Steven Wong. The only thing that was stated was that SD1 received a letter from the plaintiff dated 10 January 1997 depositing 4,027,521 shares with the defendant and on 14 January 1997 he was informed by Steven Wong to transfer the said shares to a third party account in another company. Nowhere was it mentioned of the telephone instruction by the plaintiff to Steven Wong to transfer the said shares to the third party account.

[10] The learned counsel for the defendant submitted that the learned trial judge made a finding that the plaintiff had verbally instructed Steven Wong to deposit the said shares to Ch'ng Hong's account with ICL. The fact that Ch'ng Hong was the sister seemed to be a big factor in pursuading the trial judge to come to that finding. Further, I find that the learned trial judge relied entirely on the submission of the defendant in coming to that finding. The defendant submitted that there was a telephone conversation between the plaintiff and Steven Wong that took place on 10 January 1997 which conversation referred to the plaintiff's letter dated 10 January 1997. As a result of that conversation Steven Wong informed SD1 that the plaintiff wanted the said shares to be transferred into the account of Ch'ng Hong with ICL. The defendant added that this was done to enable the plaintiff to trade on Ch'ng Hong's account and the plaintiff was aware of this and did not protest. The defendant also submitted that because of all these the learned judge came to a correct finding when he said:

> It is this court's finding that the plaintiff wanted to deposit the said shares into his nominee, Ch'ng Hong's ICL account to enable him to trade on his sister's account which would not be possible without the deposit of those collateral. When the said shares were deposited the plaintiff had already financed his purchase of the TIB shares, which was the sole purpose of the facility granted by the defendant. It is the finding of this court that the deposit was made pursuant to the plaintiff's phone conversation with Steven Wong on 10 January 1997, on which date Ch'ng Hong's ICL's account was also opened. This court also found, on a balance of probabilities, that verbal instructions through the telephone were indeed given through Steven Wong whenever the plaintiff had dealings with the defendant.

[11] SD1, in his evidence as cited above, only stated that by a letter dated 10 January 1997 the plaintiff deposited the said shares with the defendant. The letter was received by the defendant on 13 January 1997. On 14 January 1997, Steven Wong informed SD1 that the plaintiff wanted to deposit the said shares into the account of Ch'ng Hong with ICL. Based on that, on the same day, SD1 deposited the said shares into Ch'ng Hong's account with ICL. There was no mention of any telephone conversation between the plaintiff and Steven Wong. There is nothing in that evidence to suggest that SD1 was present when Steven Wong spoke to the plaintiff. SD1 only stated that he was informed by Steven Wong of the instruction, not of the telephone conversation. In my view, there was no evidence of the telephone conversation between Steven Wong and the plaintiff. Even if there was mention of the telephone conversation between Steven Wong and the plaintiff whereby the instruction was given it would only be hearsay which should not be admitted as evidence. Nowhere was it stated in the evidence of SD1 to say that the purpose of depositing the said shares into Ch'ng Hong's account was to enable the plaintiff to trade as submitted by the defendant. Looking at the evidence as a whole, it is clear to me that the defendant failed to establish that there was a telephone conversation between Steven Wong and the plaintiff that took place on 10 January 1997 whereby the instruction was given. Even if there was a telephone conversation it would not be admitted because it would be hearsay, unless Steven Wong himself gave evidence whereby SD1's evidence would be the corroborating evidence.

[12] The learned judge in his judgment referred to the letter dated 10 January 1997 where it referred to a telephone conversation that took place between the

plaintiff and Steven Wong. To me, it was a mere telephone conversation between the two but there was no evidence of any instruction. As can be seen the telephone conversation took place before the letter was written. If indeed there was such an instruction surely it would be in the letter because this was very important to the parties. Secondly, it is clear from the evidence when the plaintiff deposited the said shares with the defendant, the plaintiff's account with the defendant was in the clear. If the plaintiff intended the said shares to be deposited into Ch'ng Hong's account he could do so directly without going into a round about way. As such I see no justification in the finding of the learned judge in respect of the instruction.

[13] Turning to the documentary evidence, I am of the view that there is no document to support the defendant's contention that there was instruction given by the plaintiff to transfer the said shares. The first letter which I view as relevant is the letter dated 14 April 1999 from the plaintiff to the defendant. The letter reads as follows:

> Dear Sirs,
>
> RE: MARGIN ACCOUNT NO C06971
>
> With reference to the above captioned, I wish to collect/transfer all the Moratorium shares which had been pledged to your firm as highlighted below:

Held by	1998	1999	2000	Total Position of Shares
Ch'ng Ping Teong	820,882	820,882	547,526	2,189,020

> Enclosed is a copy of our letter which reflected the shares held by your firm for your reference.
>
> The above captioned account has no outstanding balances.
>
> Please effect the necessary delivery/transfer within 14 days from the date hereof failing which we will not hesitate to seek legal recourse.

[14] The plaintiff followed up with another letter dated 25 May 1999 which reads:

> Dear Sirs,
>
> RE: MARGIN ACCOUNT NO C06971
>
> As you may recall, when I opened the above-stated account, I was required to furnish 'moratorium' shares to secure any indebtedness or trading margins incurred thereunder.
>
> I accordingly arranged for placement of shares belonging to me and two other parties as third parties chargors, ie, Ch'ng Ping Choo and Sujana Jaya Sdn Bhd to be deposited with you towards this end.

A copy of my letter dated 10 January 1997 forwarding the said shares and the particulars thereof is annexed for your easy reference.

I have since the opening of the said account never operated the same to purchase any shares and neither have I incurred any liability thereunder. I accordingly hereby instruct you to close the account forthwith and return all shares placed as deposit thereunder to the respective owners as follows:

Name	CDS A/c No	Total Shares
Ch'ng Ping Teong	009651951	3,009,902 shares
Ch'ng Ping Choo	068002021029467 (Hwang-DBS)	570,117 shares
Saujana Jaya Sdn Bhd		447,502 shares

As for the Sujana Jaya Sdn Bhd's CDS Account, we shall inform you later. Please effect the necessary delivery/transfer within the next 48 hours.

[15] The response by the defendant to the above letters was the letter dated 3 June 1999 which reads:

Dear Sir,

4,027,521 Timber Master Industries Berhad shares

We refer to the above matter and to your letter dated 25 May 1999.

We denied all the allegations in your letter. As you are well aware, the shares which you delivered to us under cover of your letter dated 10 January 1997 were on your instructions and with your full knowledge and consent, deposited in the Share Margin Financing account of your sister, Ms Ch'ng Hong maintained with Insas Credit & Leasing Sdn Bhd ('ICL').

As per your aforesaid instructions, the shares were deposited in Ms Ch'ng Hong's account on 14 January 1997. ICL has sent the Securities Acknowledgement Receipts to Ms Ch'ng Hong to confirm that the shares have been duly pledged to her account and reflected in the monthly statement of account issued by ICL. In addition, the shares were never reflected in the monthly statement of account issued by us to you in respect of your account no. C06971, and you have never queried or disputed the same.

As such, we will not be able to meet your request to return the shares. However, we will proceed to close your account as instructed.

[16] This letter clearly reveals that the purported instruction to transfer the said shares was not in writing. As can be seen, this letter was in response to the two earlier letters written by the plaintiff. In the letter the defendant stated that the said shares had been transferred to Ch'ng Hong's account and that the plaintiff should know about it because it was done on the plaintiff's instruction and reflected in the

monthly statement of the plaintiff's account. Further, the defendant alleged that the plaintiff did not raise any query in respect of the transfer. The plaintiff responded to this through his solicitors by the following letter:

> Dear Sirs,
>
> 4,027,521 TIMBERMASTER INDUSTRIES BERHAD SHARES
>
> Your letter of 3 August 1999 to our client, Mr. Ch'ng Ping Teong refers of which has been handed to us to reply thereto.
>
> We apologise for the late reply due to heavy commitments and work load of our Dato' Vijay Kumar who is the solicitor in charge of this matter.
>
> Our client instructs that he has never given any instructions as alleged by you. Kindly forward to us a copy of our client's alleged instructions.
>
> Further our client has no connection with Miss Ch'ng Hong's account with Insas Credit & Leasing Sdn Bhd.
>
> Our client has further never activated his account and therefore received any 'monthly statement' as alleged by you. Please furnish us with proof of posting and copies of all such statements purportedly sent to our client.
>
> Please let us have your reply within the next seven (7) days and kindly nominate solicitors to accept service of process as our client intends to file action for recovery of his shares.
>
> Thank you.

[17] The above letter made it very plain that the plaintiff did not give any instruction in respect of the transfer and that he never received the monthly statements as alleged by the defendant because the plaintiff's account pertaining to the monthly statements was not activated. The plaintiff also requested for proof that the monthly statements were sent to him and requested for a copy of the instruction given by him. It is the plaintiff's case that whatever instructions given by him would be in writing. He produced voluminous letters (pp 402–453 of the appeal record) to prove his point. Those letters clearly show the instructions being given to the defendant to transfer funds or shares from his account to other accounts including Ms Ch'ng Hong's account. When there were urgent instructions, copies of the letters were faxed to the defendant. It was the plaintiff's contention that any transfer of funds or shares from his account would be done in writing. Even if there was an instruction on the phone it would be confirmed by a letter. In most cases the instruction by phone was not necessary because a copy of the instruction in writing was faxed to the defendant immediately. I have also noted that in most cases the transfers were in respect of funds and not shares. This is understandable because the funds have determined value whereas the value of the shares fluctuate and as such is difficult to cover the amount owing. It is not disputed that the plaintiff instructed Ch'ng Hong's account to be opened with ICL as can be seen from the letter dated 16 September 1996 (p 416 of the appeal record):

CH'NG PING TEONG
152, Persiaran Raja Muda Musa, 42000 Port Klang
Tel: 03-3688733 Fax: 03-3651618

16 September 1996

M & A Securities Sdn Bhd
Bangunan Perak Chinese Chamber of Commerce,
35-37, Jalan Tun Sambanthan,
30000 Ipoh, Perak.
Attn: Mr. Steven Wong

Dear Sir,

Re: Opening of New Account

Below is my New Nominee info:

Name: Ch'ng Hong

I/C No: 5169040

Address: 152, Persiaran Raja Muda Musa, 42000 Port Klang, Selangor D.E.

Regards

[18] The opening of the account itself does not mean that the instruction to transfer could be done by phone. I have gone through the various correspondences exhibited in the appeal record. They show that the transfers done were mostly, if not all, in respect of cash amount and not shares. The transfer of shares were done within the accounts with the defendant. This can be seen from the letters dated 1 October 1996 and 8 November 1996 which read:

01 October 1996

M & A Securities Sdn Bhd
Bangunan Perak Chinese Chamber of Commerce,
35-37, Jalan Tun Sambanthan,
30000 Ipoh, Perak.
Attn: Mr Steve Wong

Dear Sir,

Kindly arrange to transfer RM9.9 million from my Account to Ch'ng Hong's Margin Account No: C06983 to settle her outstanding balance.

Thank you.

And:

08 November 1996

M & A Securities Sdn Bhd
Bangunan Perak Chinese Chamber of Commerce,
35-37, Jalan Tun Sambanthan,
30000 Ipoh, Perak.

Dear Sir,

Re: Account No: C06971

Kindly arrange to transfer TMASTER shares to the below-mentioned at your soonest.

Account Name: TA Securties Sdn Bhd

CDS No: 0740001-012193330

Qualifier Account: KLM – 0036

Registration No: 290222-A

Quality: 1,500,000 shares

Yours faithfully,

Sgd.

Ch'ng Ping Teong.

[19] The above two letters also demonstrated and confirmed the plaintiff's contention that all instructions in respect of transfers whether shares or cash amount were done in writing. For that reason the plaintiff contended that there was no instruction given by him to Steven Wong to transfer the said shares into Ch'ng Hong's account with ICL.

[20] In the present case, only SD1 gave evidence on behalf of the defendant. I find that it is useful to refer to his testimony in court found at p 119 of the appeal record:

Put: M & A Securities was only appointed on 17 March 1997.

J: No it was appointed earlier, ie, from the day of opening of account.

Put: Your testimony today is inconsistent with this agreement?

J: No

The agreement is to formalise.

Yes in respect of this agreement my testimony is inconsistent with it.

Put: *At the time the shares were deposited into Ch'ng Hong's account in Insas C & L Ch'ng Hong had not appointed M & A Securities as the stockbroker pursuant to the share financing facility?*

J: *In respect of this margin agreement, yes.*

Rujuk K38 – Keterangan Utama saksi para 16 – ms 8

No, I did not have any personal knowledge of the instruction given by Ch'ng Hong to Steven Wong.

S: *Maybe such instruction given.*

J: *It could be.*

Could it be that the shares were wrongly deposited into Ch'ng Hong's account?

J: *It cannot be because Ch'ng Hong's account was opened on 10 January 1997 and the shares were supposed to be deposited into this account.*

Yes, there is no document to stipulate into Ch'ng Hong's account but it was understood.

Yes, I stated that we were instructed to do so by Steven Wong.

Yes, I have no personal knowledge of this instruction.

S: *Were you aware of any written instruction given to Steven Wong.*

J: *I didn't see any letter. He passed me the shares.*

I have no knowledge of any written instruction authorising the deposit of the shares. I did not receive any written instruction.

Further down at p 121, SD1 stated:

S: Was there any other attempt to contact Steven Wong apart from these two attempts.

J: 20 July 2001 dan 21 August 2001 – ditanda Esbt D12 7 D2.

No response from Steven Wong.

His wife refused to give me his address. Mrs Wong has not been subpoenaed to testify. The wife told me that Steven Wong is working in Korea. I do not have personal knowledge of this. It's possible he's still in the country. No attempt was made to verify that he is in Korea.

Yes, Steven Wong's testimony is extremely crucial.

Rujuk para 17 – K.38.

Put: Ms Ng did not give such a confirmation.

J: I disagree.

Para 14 dirujuk.

Yes written instructions had been given for transfer of shares.

S: *Isn't it strange that in this instance there was no such written instruction.*

J: *I received instruction from Steven Wong.*

S: How is a contract note and statement generated from the computer and sent out?

J: *In respect of contract notes, transactions are key-in into a system provided by KLSE. End of day, KLSE will download those trade information into our companies database. Then our company will generate out the information. Contract notes are generated by the Contract Department.*

In respect of statements, the information in the statement will include trades mentioned before and other information's eg, cash positions. These information are keyed in by Margin Department Personal. At the end of the month statements will be printed out and hand over to Contract Department for posting. The posting is done by Contract Department. They record the no. of statements being sent out in window envelopes.

Rujuk Ikatan B ms 7.

Put: Ms Ng did not receive this statement.

J: I disagree.

Ms 7

This is not the monthly statement that we sent out to clients. This statement will be posted out by the Contract Department. I can't remember if this statement was sent out.

(Emphasis made)

[21] The testimony of SD1 above did not establish the fact that there was a telephone instruction given by the plaintiff for the transfer of the said shares. SD1 was honest enough to admit that he had no personal knowledge of the instruction given by the plaintiff to Steven Wong. SD1 also admitted that he had no knowledge of any written instruction of transferring the said shares which would normally be in the case of transfer of shares. He only stated that Steven Wong passed to him the said shares and instructed him to transfer the said shares to Ch'ng Hong's account.

[22] Bearing in mind that it was the defendant who claimed that it was the plaintiff who instructed the transfer of the said shares, the onus is on the defendant to establish such instruction existed. The defendant failed to do so. The defendant only succeeded in establishing that there was instruction from Steven Wong to SD1. In the

present case, the learned judge was clouded by the facts that because Steven Wong could not come forward to give evidence and that there was instruction from Steven Wong to SD1 in respect of the transfer, there must have been such an instruction from the plaintiff to Steven Wong. In my view, the learned judge was in error in coming to that conclusion. I am of the view that the defendant failed to discharge the onus that there was such instruction by the plaintiff for the transfer.

[23] I am sympathetic with the defendant for not securing the attendance of Steven Wong to give evidence in court but that would not give the court the right to come to the conclusion that such instruction did take place. Let me now turn to the fact of the defendant securing the attendance of Steven Wong. There is no doubt that the defendant did write two letters dated 4 April 2001 and 30 April 2001. SD1 also stated that he inquired of the whereabout of Steven Wong and was informed that he was working in Korea.

4 April 2001

Steven Wong Kee Kiong 24, Tingkat Taman Ipoh 6, Ipoh Garden South	BY AR REGISTER
Steven Wong Kee Kiong No. 18 SS2/95, 47300 Petaling Jaya Selangor	BY AR REGISTER
Steven Wong Kee Kiong 35 Lintasan Perajurit 8, Taman Ipoh Timur, 31400 Ipoh	BY AR REGISTER

Dear Sir,

RE: WITNESS

We wish to inform that we would like to seek your assistance to come forward to assist us in a legal suit 'Ch'ng Ping Teong vs M & A Securities Sdn Bhd' which is coming up for hearing in Ipoh High Court on the 21 & 22 June 2001.

We would appreciate if you could revert to us on an urgent basis to enable us to make the necessary preparation.

Yours faithfully

For M & A Securities Sdn Bhd

Sgd.

Neoh Wee Hong

Assistant Manager.

The other letter reads:

30 April 2001

Steven Wong Kee Kiong 24, Tingkat Taman Ipoh 6, Ipoh Garden South	BY AR REGISTER
Steven Wong Kee Kiong No. 18 SS2/95, 47300 Petaling Jaya Selangor	BY AR REGISTER
Steven Wong Kee Kiong 35 Lintasan Perajurit 8, Taman Ipoh Timur, 31400 Ipoh	BY AR REGISTER

Dear Sir,

RE: WITNESS

We refer to our registered letter dated 4 April 2001, we have not received a response from you.

We wish to inform that we would like to seek your assistance to come forward to assist us in a legal suit 'Ch'ng Ping Teong vs M & A Securites Sdn Bhd' which is coming up for hearing in the Ipoh High Court on the 21 & 22 June 2001.

We would appreciate if you could revert to us on an urgent basis to enable us to make the necessary preparation.

Yours faithfully

For M & A Securities Sdn Bhd

Sgd.

Neoh Wee Hong

Assistant Manager.

[24] Perusing the two letters, it is clear to me that the defendant wanted the said Steven Wong to contact the defendant to assist the defendant in respect of the dispute between the plaintiff and the defendant. First of all, there was no mention of the instruction given by the plaintiff to Steven Wong. It only stated that this case would come up for hearing in the Ipoh High Court in June 2001. Secondly, other than the two letters and the inquiry from the wife, the defendant did nothing else to trace the said Steven Wong. Lastly, the defendant did not apply for a subpeona to compel the said Steven Wong to give evidence. As I have stated earlier, the letter did not indicate what sort of evidence was required from Steven Wong. It might well be in respect of the opening of the account of the plaintiff with the respondent. For that reason these letters would not help the defendant in its case. As I have stated earlier, s 32 of the Evidence Act would not apply because there was no sufficient evidence to prove that

Steven Wong who was alive then could not be found. Further, s 32 applies only to the statement made by the missing person and in this case there was no statement by Steven Wong. Even SD1 admitted this fact in his testimony when he said Steven Wong handed the said shares to SD1 and instructed him to transfer those shares into Ch'ng Hong's account. SD1 admitted that Steven Wong did not mention that the instruction came from the plaintiff.

[25] The learned counsel for the defendant submitted that the telephone conversation where the purported instruction was given was referred to in the letter from the plaintiff to the defendant found at p 180 of the appeal record. The defendant further submitted that it was on the strength of this letter that the learned judge found that there was an oral instruction by the plaintiff to Steven Wong which reads as follows:

10 January 1997

M & A Securities Sdn Bhd

Bangunan Perak Chinese Chamber of Commerce,

35-37, Jalan Tun Sambanthan,

30000 Ipoh, Perak.

Attn: Mr Steven Wong

Dear Sir,

Re: Margin Account No. C06971

As per our teleconversation on 10 January 1997 refers. Enclose herewith the moratorium shares of Tmaster:

A	Ch'ng Ping Teong	000,136	820,882	000,137	820,882	000,138	820,882	000,132	547,256
B	Ch'ng Ping Choo	000,250	155,457	000,251	155,457	000,262	155,457	000,256	003,656
C	Saujana Jaya Sdn Bhd	000,371	122,046	000,372	122,046	000,373	122,046	000,367	81,364
	Total		1,095,415		1,095,415		1,095,415		732,275

Kindly acknowledge receipt.

Thank you.

[26] Perusing the letter closely, the letter only referred to the deposit of the said shares into the plaintiff's account. Nowhere was it mentioned that the said shares were to be transferred to Ch'ng Hong's account with ICL. The telephone conversation mentioned above referred to, in my view, the deposit of the said shares into the plaintiff's account. Ch'ng Hong's account with ICL was not mentioned anywhere in that letter. The learned judge was in error if he came to a finding that the instruction was indicated in that letter.

[27] For the above reasons, there is merit in the submission of the plaintiff and that the learned judge was in error in accepting the submission of the defendant.

[28] The plaintiff's claim in the present appeal was for the return of the said shares which was deposited with the defendant. The defendant's defence was that it could not return the said shares because it was transferred into Ch'ng Hong's account with ICL on the instruction of the plaintiff. The defendant failed to establish that the shares were transferred on the instruction of the plaintiff. For that reason, the plaintiff had proved its case that the defendant had transferred the said shares wrongly and without authority. Therefore, the plaintiff is entitled to the prayers he sought.

[29] For the reasons we have stated above, the appeal is hereby allowed with costs here and below. The appellant is entitled to the prayers stated in paras 7(a), 7(b) and 7(c). The order of the learned judge is hereby set aside.

[30] My learned brothers, Augustine Paul and Hashim Yusoff FCJJ, had seen this judgment in draft and conveyed their agreement to it.

Appeal allowed with costs.

Reported by Brendan Navin Siva